No. 15953.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT D. HORNBAKER,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant was found guilty on November 15, 1957, after trial by jury in the United States District Court for the Southern District of California, Southern Division, of knowingly failing to report for induction into the armed forces of the United States in violation of Section 462(a), Title 50 Appendix, United States Code. [Tr. 3-4, 164.][1] Sentence was imposed on December 2, 1957. [Tr. 20-21.] The District Court had jurisdiction under Section 3231, Title 18, United States Code. Appellant filed notice of appeal on December 6, 1957, in the manner required by law. [Tr. 21-22.] This Court has jurisdiction under Section 1291, Title 28, United States Code, and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

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[1]Tr. refers to the Transcript of Record; SSF refers to appellant's Selective Service File, Government Exhibit 1.

Statement of the Case.

September 15, 1948. Appellant registered with Local Board No. 140 in San Diego County giving 184 National Avenue, Chula Vista, California, as his mailing address. [SSF 1-2.][2]

May 16, 1949. Appellant filed a Classification Questionnaire, SSS Form 100, with the Local Board stating that he was not a minister and indicating that he was not a conscientious objector. [SSF 4-10.]

July 11, 1950. Classified 1-A. [SSF 11.]

July 14, 1950. Notice of Classification, Form 110, mailed to appellant at 184 National Avenue, Chula Vista, California. Returned to Local Board marked "Not at this address." [SSF 11, 18-19.]

May 24, 1950. Appellant married Joan Marilyn Norlander. [SSF 17.]

October 27, 1950. Classified III-A. [SSF 11.]

November 7, 1951. Reclassified 1-A. [SSF 11.]

November 13, 1951. Local Board received postcard from appellant saying: "I received my 1-A classification November 8, 1951, Friday. Would you please send me a conscientious objector form as soon as possible." This was the first indication that appellant might claim to be a conscientious objector. [SSF 22-23.] November 13, 1951. Appellant again wrote to Local Board, saying: "Due to training (Bible) and belief I would appreciate having you give me form 150." [SSF 14.]

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[2]SSF page references 1-13, inclusive, and 22-23 refer to the penciled circled numbers; other page references are to underlined penciled numbers.

November 19, 1951. Appellant filed Special Form for Conscientious Objector, Form No. 150, with Local Board. [SSF 30-47.]

December 17, 1951. Revised Special Form for Conscientious Objector filed. [SSF 52-57.]

January 9, 1952. Classified 1-A-O, available for noncombatant military service. [SSF 11.]

February 11, 1952. Appellant appeared before Local Board. [SSF 63-64.]

February 27, 1952. Classified II-A, occupational deferment. [SSF 11.]

September 24, 1952. Reclassified 1-A. [SSF 11.]

October 15, 1952. Reclassified II-A. [SSF 11.]

January 7. 1953. Reclassified 1-A again. [SSF 11.]

January 19, 1953. Appellant filed notice of appeal from 1-A classification. [SSF 76.]

January 23, 1953. Local Board forwarded Selective Service File to Appeal Board. [SSF 13.]

February 19, 1953. Appeal Board sent file to Department of Justice for an advisory opinion. [SSF 80.]

September 18, 1953. Appeal Board sent Local Board a form on which to report registrant's last change of address. [SSF 81.]

September 21, 1953. Local Board sent form to Appeal Board, stating that appellant had changed his address to 650 11th St., San Diego, California. [SSF 81.]

September 23. 1953. Appeal Board notified Department of Justice of appellant's new address. [SSF 82.]

March 23, 1954. Department of Justice recommended to the Appeal Board that appellant's conscientious objector

claim not be sustained. The recommendation was based, in part, on fact that appellant "admitted that he swore to a complaint for incompatibility for a divorce action against his wife, which was false." [SSF 83-85.]

April 9, 1954. Appeal Board classified appellant 1-A. [SSF 90.]

April 13, 1954. Appeal Board returned file to Local Board. [SSF 13.]

May 4, 1954. Local Board ordered appellant to report for induction on May 19, 1954. [SSF 89.]

May 20, 1954. Appellant reported but refused to be inducted. [SSF 13, 91-92, 94-95.]

May 26, 1954. Local Board ordered appellant to appear for an interview on June 3, 1954. [SSF 93.]

June 3, 1954. Appellant appeared. [SSF 96-97.]

June 7, 1954. Appellant wrote to the Local Board by registered letter, saying: "At this time I wish to inform you of my departure from San Diego to Modesto, Calif. because of secular employment. The Federal Bureau of Investigation I have notified, when in Los Angeles after induction procedures. My new address is (Same Employer) 1431 10th St., Modesto, Calif., but can be reached within one or two days at my San Diego address." [SSF 147-148.]

June 18, 1954. Local Board sent appellant's Selective Service File to State Director. [SSF 13, 149.]

August 9, 1954. State Director told Local Board that National Director had decided that appellant should be prosecuted. [SSF 150.]

August 11, 1954. Selective Service File returned to Local Board by State Director. [SSF 13.]

August 27, 1954. Local Board reported to the United States Attorney that appellant was delinquent for refusing induction. [SSF 151.]

September 9, 1954. Local Board sent appellant's Selective Service File to State Director for photostating. [SSF 13, 154.]

September 20, 1954. State Director returned Selective Service File to Local Board. [SSF 13.]

November 2, 1954. Local Board sent Selective Service File to Headquarters, Southern Area, Selective Service System in Los Angeles. [SSF 157.]

November 26, 1954. Headquarters, Southern Area, forwarded Selective Service File to State Director in Sacramento. [SSF 162.]

January 4, 1955. State Director returned Selective Service File to Headquarters, Southern Area. [SSF 164.]

July 11, 1955. Headquarters, Southern Area, returned Selective Service File to Local Board. [SSF 13, 168.]

August 4, 1955. United States Attorney advised Local Board that indictment against appellant had been dismissed because of the recent decision of the Supreme Court in *Gonzales v. United States,* 348 U. S. 407. [SSF 170.]

October 28, 1955. Local Board again ordered appellant to report for induction, this time on November 8, 1955; Order sent to appellant's last known address, 1431 10th St., Modesto, Calif. [SSF 172.]

November 8, 1955. Appellant failed to report. [SSF 13, 176.]

January 3, 1956. Local Board reported appellant to United States Attorney as delinquent for failure to report for induction. [SSF 13, 176.]

I.

The Appellate Court Should View the Evidence Most Favorably to the Government.

An Appellate Court should not weigh the evidence or pass on the credibility of witnesses. Therefore, a conviction should be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

United States v. Glasser, 315 U. S. 60, 80 (1942);

Dean v. United States, 246 F. 2d 335, 336-337 (8th Cir., 1957);

United States v. Brown, 236 F. 2d 403, 405 (2d Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1955), cert. den. 350 U. S. 954 (1956);

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), cert. den. 347 U. S. 937 (1954);

Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

O'Leary v. United States, 160 F. 2d 333 (9th Cir., 1947).

Despite this well-established rule, appellant sets forth the evidence and the inferences which might reasonably be drawn therefrom most unfavorably to the government and proceeds on the theory that the jury believed appellant's testimony and that of his witnesses. The error in this reasoning is set forth in *Dean v. United States, supra,* as follows:

> "The jury having returned verdicts of guilty, we must assume that all conflicts in the evidence were resolved in favor of the government and, as we have often said, the prevailing party is entitled to the bene-

fit of all such favorable inferences as may reasonably be drawn from the facts proven and if, when so considered, reasonable minds might reach different conclusions the issue is one of fact to be submitted to the jury and not one of law to be determined by the court."

Appellant attempts to get around this principle by beginning the first three points of his argument with a statement of what the "undisputed evidence" shows. The Government contends (1) that the evidence was not undisputed, (2) that the Government's evidence on each point was substantial and (3) that, under the principle set forth above, the conviction must be sustained.

II.

Substantial Government Evidence Shows That the Local Board Mailed the Order to Report for Induction and That the Defendant Received It.

Appellant states that "the undisputed evidence shows that the order to report for induction was not actually deposited in the mails." (Appellant's Br. p. 29.)

This statement should be compared with the testimony of Mrs. Haisch, the clerk of appellant's local board, to the effect that she prepared the original order; that a board member signed it; that she placed the order in an envelope bearing appellant's last known address, 1431 10th Street, Modesto, California; that she put the envelope in an office mail box; that it was the custom of the local board for one of the clerks to deposit the mail from the office mail box in a post office mail box at the end of each day; that the envelope had the words "Selective Service System Official Business" printed on the top; that the envelope had the return address of the local board stamped

on it; and that the order was never returned to the local board. [Tr. 29-37, 39-41.]

This evidence and the inferences which might reasonably be drawn from it show that the order was mailed and that the defendant received it. As stated in Section 95 of Wigmore on Evidence (3rd Ed.):

> "The fixed methods and systematic operation of the *Government's postal service* have long been conceded to be evidence of the due delivery to the addressee of mail matter placed for that purpose in the custody of the authorities. . . . The habit of a *commercial house,* maintaining systematically a mailing system or other transmission system is equally relevant. . . . The same application of the principle would admit any person's usual course of *business practice* to evidence *any act of delivery or transmission,* such as the sending of a notice, or the placing of letters in the mailbox; the only differences are, first, that the fact of the government system will be judicially noticed without further evidence . . . and secondly, that the course of business of an individual may under the circumstances not appear sufficiently fixed to be of probative value. A consequence of the combination of these two applications is that, upon proper evidence of the habit of an individual commercial house as to the addressing and mailing, the mere *execution* of a letter in the usual course of business may be evidence of its subsequent receipt by the addressee."

That this is true in a criminal case is shown in *United States ex rel. Helmecke v. Rice,* 281 Fed. 326 (S. D. Tex., 1922). Helmecke was convicted of desertion by a court martial after having been lawfully inducted into the military service. He brought a writ of habeas corpus on

the grounds that he had never been inducted and therefore the military court did not have jurisdiction. The Supplementary Rules and Regulations in effect when Helmecke was inducted provided that the Adjutant General should mail a notice to prospective inductees informing them that they had been selected for military service and ordering them to report to the Adjutant General on a date specified. The Rules and Regulations further provided that: "From the date so specified, each man to whom such notice shall have been mailed shall be in the military service of the United States."

The only evidence of mailing in the *Helmecke* case was testimony on the custom in the Adjutant General's office. Yet, the Court held that the military had jurisdiction.

Said the Court:

> "The better rule, and that which seems to be established by the weight of authority, is that in the absence of direct evidence there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle, and in addition there must be testimony of the employee, whose duty it was to deposit the mail in the post office, that he either actually deposited that mail in the post office, or that it was his invariable custom to deposit every letter left in the usual receptacle, and that he never failed in carrying out that custom. The law in the case is well stated in Wm. Gardam & Son v. Batterson, 198 N. Y. 175, 91 N. E. 371, 139 Am. St. Rep. 806, reported and annotated in 19 Ann. Cas. 651, while perhaps the best considered cases on the subject are the opinions of Judge Johnson, of the Kansas City Court of Appeals of the state of Missouri, in Goucher v. Carthage Novelty

Co., 116 Mo. App. 99, 91 S. W. 447, and Sills v. Burge, 141 Mo. App. 148, 124 S. W. 606.

* * * * * * * *

"There is no doubt that, except for the fact that there is no direct evidence that this particular letter to Helmecke was prepared and placed in an envelope for mailing, correctly addressed, the testimony in this case measures not only fully, but exactly, up to the requirements of all the adjudged cases. Here is proof in the most meticulous and satisfactory way of an invariable custom or usage in an office of depositing mail in a certain receptacle, and in an equally accurate and meticulous way that all mail deposited in that receptacle was by the employee whose duty it was to deposit it in the post office, so deposited.

"Can it be said that the evidence is wanting in proof of the other requisite, that the letter in question was deposited for mailing in the receptacle? On this point I think there can be little doubt. The existence of a carbon requires the existence of the original, and proof that a carbon existed requires the inference that an original also existed. It is therefore indisputably true that there was made an original and a carbon of the Helmecke notice, just as in other cases.

"It is true there is no proof that the original was signed or mailed, but there is direct proof that the carbon was placed in the delinquent's file, and there kept, as was the invariable custom with reference to mailing delinquent notices, and there is proof that the original was never separated from the carbon until it was placed in the envelope for mailing. Can it be that such circumstances as these are insufficient to establish the ultimate fact that the original was prepared and placed in the letter for mailing? I think not.

"In 22 Corpus Juris, p. 99, it is said:

" 'In order to support a presumption of the receipt of a letter, there must be satisfactory proof that it was duly mailed although such proof need not consist of direct and positive testimony of the ultimate fact of mailing.'

"In 10 Ruling Case Law, §196, it is said:

" 'Generally speaking, issues may be established in both civil and criminal cases by circumstantial evidence'

—and that conviction for the greatest crimes and matters of the gravest importance may rest alone on circumstantial evidence is too well known to require the citation of authorities."

Appellant attempts to distinguish the *Helmecke* case on the grounds that the Court there held that "there was substantial evidence sufficient to find that the order was mailed, but here there is no positive proof about any custom of depositing in the mails." (Appellant's Br. p. 31.)

This statement should be compared with the following testimony of Mrs. Haisch:

"Q. Now, do you actually recall mailing this particular order? A. Yes, I do, because I knew Mr. Venus, and I remembered mailing it.

Q. And do you have a regular mail box that you put all your mail in? A. Yes.

Q. And on this occasion did you put this particular letter in that box? A. I can't say that I put it in the mail box. I put it in the box in our office, mail box in our office.

Q. Who picks the mail up from the mail box in your office? A. Usually one of us clerks takes the

mail over and puts it in the box before or at the close of business for the day.

Q. You have a specific receptacle in your office then where you put all your out-going mail? A. Yes, that is correct.

Q. Who goes and gets the mail out of the receptacle? A. One of the clerks puts the mail together, bundles it and puts a rubber band around it. The out-going mail, we put "Out of Town" on it, and the local, we put a local—little something that is furnished to us by the post office. And we put rubber bands around them. And one of the clerks is responsible for the mailing of all our mail." [Tr. 39-40.]

Appellant also states that the Government witness said "that she did not do it [actually mail the envelope] and that it was not her duty." (Appellant's Br. p. 31.) The Court should note that nowhere in the record did Mrs. Haisch testify that it was not her duty to actually deposit the envelopes in a post office mail box. She only admitted that she did not recall putting this particular letter in such box. [Tr. 40.]

There is a further reason why the Court should hold that there was substantial evidence showing that the local board mailed the order. As stated in Section 2534 of Wigmore on Evidence, 3rd edition:

> "The general experience that a rule of official duty or a requirement of legal conditions, is fulfilled by those upon whom it is incumbent has given rise occasionally to a *presumption of due performance of official duty.*"

The mailing of the order was one of the local board's official duties. This is shown by Section 1632.1 of the

Selective Service Regulations, 32 C. F. R., Section 1632.1, which provides that:

> "Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (SSS Form No. 252) in duplicate. The date specified for reporting for induction shall be at least 10 days after the date on which the Order to Report for Induction (SSS Form No. 252) is mailed, . . . The local board shall mail the original of the Order to Report for Induction (SSS Form No. 252) to the registrant and shall file the copy in his Cover Sheet (SSS Form No. 101)."

The presumption of due performance of official duty has been used in at least two Selective Service cases to sustain convictions.

United States v. Fratrick, 140 F. 2d 5 (7th Cir., 1944);

Koch v. United States, 150 F. 2d 762 (4th Cir., 1945).

III.

Substantial Government Evidence Shows That the Order Was Sent to the Correct Address.

The appellant and his witness, Mr. Edwin Beil, testified that appellant mailed a postcard in Los Angeles in February, 1955. Appellant testified that it was unregistered and addressed to his local board notifying them of a change of address to 1120 30th Street, San Diego, California. [Tr. 63-64, 76, 95-103.] Therefore, appellant concludes that "the undisputed evidence shows that Venus sent a postcard, addressed to the local board, through the mails." (Appellant's Br. p. 32.)

This conclusion should be compared with the following testimony of Mrs. Haisch:

> "Q. (By Mr. Duncan): Mrs. Haisch, after June 7th, 1954, and before October 28th, 1955, did you receive any other letters indicating another address from the defendant? A. Yes. Let's see. We received one on April 10, 1956.
>
> Q. Is that the next letter you received, to your knowledge? A. The change of address; yes, sir.
>
> Q. Now, every letter and every bit of correspondence concerning a registrant goes in that file, doesn't it? A. Yes, it does.
>
> Q. That is part of your job, to put those things in that file? A. Yes, sir.
>
> Q. To the best of your knowledge, every document and every letter concerning this defendant is in that file, isn't it? A. Yes, it is.
>
> Mr. Duncan: I have nothing further." [Tr. 36-37.]

This evidence and the inferences which might reasonably be drawn from it shows that the defendant did not mail a change of address in February, 1955, or at any time between June 7, 1954, and October 28, 1955.

In this connection the Court should note that appellant notified the local board of his changes of address on June 7, 1954, and in September, 1956 by registered mail. [Tr. 76-79.]

Appellant states that the testimony of Mrs. Haisch "may be completely disregarded because the file was out of the possession of the local board at the time the card was mailed in February 1955." (Appellant's Br. p. 33.)

This statement overlooks the efficiency with which the employees of the local board customarily performed their duties. For example, defendant filed notice of appeal from 1-A classification on January 19, 1953. [SSF 76.] The Local Board forwarded the Selective Service File to the Appeal Board on January 23, 1953. [SSF 13.] The Appeal Board forwarded the file to the United States Attorney on February 19, 1953. [SSF 80.] On July 13, 1953 defendant notified the local board of a change of address to 650 11th Street, San Diego, California. [SSF 78.] On September 21, 1953 the local board advised the Appeal Board of the change. [SSF 81.] Two days later, on September 23, 1953, the Appeal Board notified the United States Attorney. [SSF 82.] Thus, there is a clear showing that on a prior occasion a change of address was properly placed in defendant's Selective Service File even though the file was out of the possession of the local board at the time the notice was mailed.

IV.

Substantial Government Evidence Shows That Appellant Knowingly Failed to Report on the Date Alleged in the Indictment.

The Government's evidence shows that the local board mailed the order to report and that the appellant received it. The necessary criminal intent, that he "knowingly" failed to report, may be inferred from such proven facts and circumstances.

> *Silverman v. United States,* 220 F. 2d 36, 40 (8th Cir., 1955).

V.

Sections 1641.3 and 1642.2 of the Selective Service Regulations Are Not Unconstitutional as Construed and Applied Because They Did Not Deny Appellant Due Process of Law Contrary to the Fifth Amendment.

Section 1641.3, 32 C. F. R., Section 1641.3, provides that:

> "Communication by Mail.—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

Section 1642.2, 32 C. F. R., Section 1642.2, further provides that:

> "Continuing Duty.—When it becomes the duty of a registrant or other person to perform an act or furnish information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty."

Appellant contends that "under all the facts and circumstances of this case, Section 1641.3, which imposes constructive notice upon appellant of the outstanding order to report for induction, and Section 1642.2, which commands him to comply with the outstanding order from day to day, of which he had no knowledge, . . . constitute a deprivation of procedural due process of law,

contrary to the Fifth Amendment." (Appellant's Br. p. 36.) Appellant's argument is based solely upon his statement that "the undisputed evidence shows that Venus did not receive the order to report and that he did not learn about it until April, 1956, when he was contacted by the F.B.I. agent." (Appellant's Br. pp. 35-36.)

The evidence to the contrary has already been set out in Section II of this Brief.

The Court should note, however, that regulations similar to Section 1641.3 have been held valid in numerous decisions.

Ex parte Bergdall, 274 Fed. 458, 466 (D. Kans., 1921);

United States v. Bullard, 290 Fed. 704, 711 (2nd Cir., 1923);

United States ex rel. Bergdall v. Drumm, 107 F. 2d 897, 901 (2nd Cir., 1939);

Ex parte Caplis, 275 Fed. 980, 988 (W. D. Tex., 1921).

VI.

The District Court Did Not Commit Reversible Error in Charging the Jury That the Appellant Had a Continuing Duty to Report After November 8, 1955.

The District Court charged the jury that they could find the defendant guilty if they found "that . . . [he] knowingly failed to report at any time between November 8, 1955, and August 8, 1957, the date of the return of the Indictment." [Tr. 146.]

This was not reversible error. The Indictment charged that "the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board [Local Board No. 140] was duly given to

him to report for induction into the armed forces of the United States of America on November 8, 1955, in San Diego County, California, . . . and at said time and place . . . defendant knowingly failed and neglected to report . . ." [Tr. 3-4.]

32 C. F. R., Section 1632.14(a), provides that:

> "When the local board mails to a registrant an Order to Report for Induction . . ., it shall be the duty of the registrant to report for induction at the time and place fixed in such order . . . Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains."

See also Section 1642.2, *supra.*

A jury instruction similar to the instant one, based on Section 1642.2, *supra,* was upheld in *Silverman v. United States,* 220 F. 2d 36 (8th Cir., 1955). The Court there said:

> "The case was submitted to the jury upon the theory that although the indictment charged the failure to report for induction on June 6, 1951, the offense of failing to report, if in fact it was knowingly committed, was a continuing one. The jury was instructed that if the defendant 'knowingly' failed to report at any time between June 6, 1951, and the date of the return of the indictment, he might be convicted of the offense as charged. Defendant contends that, if committed, the offense was complete on June 6, 1951, and that to treat it as a continuing offense was error. It is argued that the mere continuance of the result of the alleged crime does not continue the crime. Pendergast v. United

States, 317 U. S. 412, 63 S. Ct. 268, 87 L. Ed. 368; United States v. Kissel, 218 U. S. 601, 31 S. Ct. 1240, 54 L. Ed. 1168; Fiswick v. United States, 329 U. S. 211, 67 S. Ct. 224, 91 L. Ed. 196; and United States v. Irvine, 98 U. S. 450, 25 L. Ed. 193, are cited in support of this contention. All of those cases dealt with the application of statutes of limitation. Although there was only one offense charged, that offense was failure to report for induction. By the Selective Service Regulations, §1642.2, 32 C. F. R., it is made a continuing offense. No assault is made upon this regulation. The nature of the offense charged is such that it may upon proper proof be a continuing one. Ledbetter v. United States, 170 U. S. 606, 18 S. Ct. 774, 42 L. Ed. 1162; United States v. Kissel, 218 U. S. 601, 31 S. Ct. 124, 54 L. Ed. 1168. The offense charged and proved was a continuing one. There was no error in so instructing the jury."

The *Silverman* case was an application, supported by regulations, of the well-established rule of law that it is not necessary to prove an offense was committed on the exact day alleged. It is sufficient to prove that the offense was committed at any time prior to the return of the indictment and within the statute of limitations.

Ledbetter v. United States, 170 U. S. 606, 612, 18 S. Ct. 774 (1898);

Weeks v. Zerbst, 85 F. 2d 996 (10th Cir., 1936);

United States v. Reisley, 32 Fed. Supp. 432, 434, 435 (D. N. J., 1940);

Lucas v. United States, 188 F. 2d 627, 628 (D. C. Cir., 1951);

Berg v. United States, 176 F. 2d 122, 126 (9th Cir., 1949);

Lelles v. United States, 241 F. 2d 21, 25 (9th Cir., 1957).

VII.

The District Court Did Not Commit Reversible Error in Failing to Give Defendant's Requested Instructions Nos. 12, 13, 14, 15 and 21.

The points raised in the requested instructions were properly covered by Government's Instructions Nos. 4 and 5 wherein the jury was instructed that in order to find the defendant guilty they must find:

> "That the defendant was ordered by said Board to report for induction into the armed forces of the United States on November 8, 1955, in San Diego County, California.
>
> "That the defendant did on such date, and at all times thereafter, knowingly failed to report for induction.
>
> "The word 'knowingly' as used in the Indictment can be taken only as meaning deliberately and with knowledge and not something which is merely careless or negligent or inadvertent." [Tr. 145.]

Furthermore, defendant's instructions Nos. 12 and 13 did not state the correct law.

32 C. F. R., Sec. 1641.3;

United States ex rel. Helmecke v. Rice, supra;

Wigmore, 3rd Ed., Sec. 95.

Lastly, if there were error, it did not affect substantial rights and should be disregarded.

F. R. C. P., Rule 52.

VIII.

The District Court Did Not Commit Reversible Error in Failing to Give Defendant's Instructions Nos. 18, 19, 23 and 25.

The point raised in Defendant's Instruction No. 18 was properly covered in Government's Instructions Nos. 4 and 5, *supra.*

Defendant's Instructions Nos. 19 and 23 do not correctly state the law.

Silverman v. United States, supra;
32 C. F. R., Secs. 1632.14, 1642.2.

Defendant's Instruction No. 25 does not correctly state the law.

32 C. F. R., Secs. 1632.14, 1642.2.

Furthermore, if there were error, it did not affect substantial rights and should be disregarded.

F. R. C. P., Rule 52.

IX.

The District Court Did Not Commit Reversible Error in Refusing to Give Defendant's Instruction No. 20.

The evidence that the appellant, even if he had reported, would not have submitted to induction was brought out by defense counsel in cross-examination without objection. [Tr. 51.] Defendant's Instruction No. 20, asking the jury to disregard any such evidence, was, in form, a motion to strike and comes too late.

Wigmore, 3rd Ed., Sec. 18.

Also, if there were error, it did not affect substantial rights and should be disregarded.

F. R. C. P., Rule 52.

Conclusion.

1. The evidence should be viewed most favorably to the Government.

2. There was substantial evidence showing that the local board mailed the order to report and that appellant received it.

3. There was substantial evidence showing that appellant knowingly failed to report on the date alleged in the indictment.

4. The Court did not commit reversible error in instructing, or failing to instruct, the jury.

5. The verdict of the trial court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT D. HORNBAKER,
Assistant U. S. Attorney,

Attorneys for Appellee.